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No. 2063 Misc.

No. .....

FILED
APR 21 1970
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

JIMMY SCOTT,

Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI to the Appellate Division of the Supreme Court of New York, Fourth Judicial Department.

LESLIE A. BRADSHAW
Attorney for Petitioner
Assistant Public Defender,
Monroe County
Appeals Division
65 Broad Street
Rochester, New York 14614
(716) 454-7200, Ext. 381

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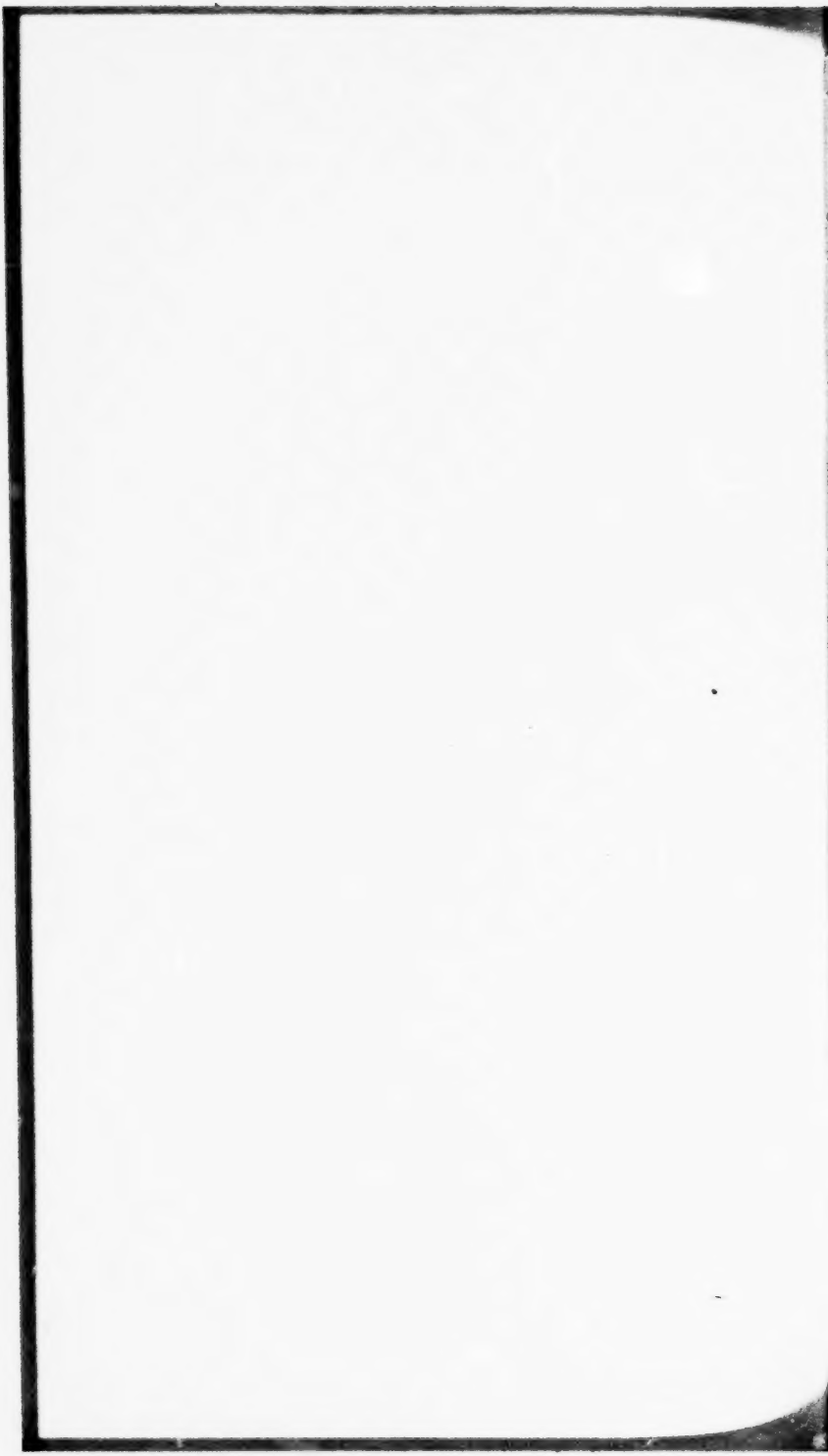
Rochester, New York



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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT.

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Jimmy Scott, hereby petitions for a writ of certiorari to review the decision of the Appellate Division of the Supreme Court of New York, Fourth Judicial Department, unanimously affirming your Petitioner's judgment of conviction of the crimes of criminal possession of a forged instrument in the second degree and grand larceny in the Monroe County Court on February 13, 1969.

DECISION BELOW

The decision below, unanimously affirming the conviction without opinion, is reported at 33 AD2d 657, and is appended hereto as Appendix A.

JURISDICTION

The order sought to be reviewed was made and entered on October 23, 1969. On February 5, 1970, the

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Hon. Matthew J. Jasen, Associate Judge of the New York Court of Appeals, certified that there was no question of law presented which ought to be reviewed by the Court of Appeals and denied permission to appeal to the New York Court of Appeals. This certificate denying leave to appeal is appended hereto as Appendix C. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. 1257 (3). By an order, dated April 2, 1970, appended hereto as Appendix B, the Appellate Division of the Supreme Court of New York, Fourth Judicial Department, amended its remittitur to certify that the Federal questions raised in this petition were considered and necessarily decided in its above-mentioned decision.

QUESTIONS PRESENTED FOR REVIEW

1. Whether denial of adjournment violated due process and effective assistance of counsel where, among other things, defense counsel had been advised by prosecution to prepare a different case for trial, where defendant expressed need to consult with attorney and locate previously unknown witness, and where denial of adjournment resulted in defendant's refusal to participate in any way in his tri

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CONSTITUTIONAL PROVISIONS INVOLVED

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence."

Fourteenth Amendment:

"....nor shall any State deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

The defendant was first arrested for criminal possession of a forged instrument in the second degree and grand larceny on April 26, 1968, which charges were dismissed on May 7th after a preliminary hearing. The matter was then turned over to the grand jury which returned an indictment for the same charges on May 23rd. On August 19, 1968, the defendant submitted a motion pro se to dismiss the indictment, the ground being that the only witness to testify as to the authenticity of the check was a local Rochester, New York claims manager who was not qualified to testify whether the payor's signature on the check was that of a person authorized by the Wassau,

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Wisconsin branch office to sign company checks. Despite three letters written by the defendant to the County Court Judge and the County Court Clerk in September and November asking about the disposition of his motion, no action was taken on the motion until January 14, 1969, five months later, the day the prosecution's chief witness from Wisconsin was in Rochester. The motion to dismiss was denied and the prosecution moved for an immediate trial (4).* Defense counsel's motion for an adjournment was denied the following day (22) and trial began immediately (24).

Defense counsel presented fourteen reasons for his motion for an adjournment, excepted to the denial of his motion, and reiterated at the beginning and conclusion of the trial the impossibility of his presenting an adequate defense because of the court's failure to grant an adjournment (33-34, 91-92).

The defendant was found guilty as charged on January 16, 1969 and was sentenced to an indeterminate term of zero to four years at Attica State Prison on February 13, 1969.

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*Numbers in parenthesis refer to pages of the original trial transcript.

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* * * *

The federal question herein was raised in the brief filed in the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, to appeal from the judgment of conviction, and was again raised in the brief submitted to the New York Court of Appeals in the request for leave to appeal to that court. The Appellate Division did not expressly pass on the constitutional issue, although it could not have affirmed the decision below without resolving the constitutional issue against the petitioner.

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POINT I

THE DENIAL OF AN ADJOURNMENT UNDER THE CIRCUMSTANCES VIOLATED DUE PROCESS AND DENIED THE DEFENDANT EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE 6th AND 14th AMENDMENTS AS PREVIOUSLY CONSTRUED BY APPLICABLE DECISIONS OF THIS COURT.

This court has in general language ruled that a judge may not exercise his discretion arbitrarily to deny a continuance in the face of a justifiable request for delay and a need by counsel to consult with the defendant and prepare a defense without violating the due process and assistance of counsel guarantees of the Fourteenth and Sixth Amendments. Ungar v Sarafite, 376 US 575, 589, 11 LEd2d 921, 931, 84 Sup Ct 841 (1964) (Victim); Nilva v United States, 352 US 385, 395, 1 LEd2d 415, 423, 77 Sup Ct 431, reh den, 353, US 931, 1 LEd2d 724, 77 Sup Ct 716 (1957); Chandler v Fretag, 348 US 3, 10, 99 LEd 4, 10, 75 Sup Ct 1 (1954); Hawk v Olson, 326 US 271, 276-79, 90 LEd 61, 65-67 (1945); Avery v Alabama, 308 US 444, 446, 84 LEd 377, 379 (1940).

The court has rejected contentions of abusive discretion where defense counsel has been given adequate advance notice of the trial date to enable him to prepare

his case, four or five days being considered adequate for contempt proceedings where the issues were uninvolved and all witnesses and information were readily available (Nilva v United States, supra; Ungar v Sarafite, supra), and three days adequate for a murder trial where all possible witnesses had been interviewed and no indication was given that counsel could have done more with additional time (Avery v Alabama, supra), and where defense counsel had previously been granted adequate continuances to prepare his case (Nilva v United States, supra; Torres v United States, 270 F2d 252 (CA 9, 1959), cited in Ungar v Sarafite, supra). Abuse of discretion has been found where a defendant had been denied an opportunity to employ (Chandler v Fretag, supra) or consult with (Hawk v Olson, supra) counsel prior to the trial. In the latter case, the defendant had talked with his counsel once for fifteen minutes, but the consultation was limited to a strong suggestion by counsel to plead guilty, and the defendant was denied a requested twenty four-hour continuance to consult with counsel, examine the charge, subpoena witnesses, and prepare a defense.

However, the court has established few guidelines between the two extremes of a completely adequate

time to prepare a defense, accompanied by a lack of any indication that a continuance would have benefited the defendant on the one hand, and a total absence of consultation or opportunity to consult on the other.

Among the more important questions raised in this petition concerning the various factors to be considered and the relative weight to be accorded them in determining whether an adjournment should be granted are: to what extent must the surprise of less than one day's notice of the trial date be considered, especially where the prosecution had told counsel to prepare a different case for trial? What consideration should be given to the court's failure to decide a five-month-old motion to inspect the grand jury minutes and dismiss the indictment until the case is moved for trial by the prosecution? Can two in-court meetings of no substance with defense counsel constitute adequate consultation? Can the court deny a brief adjournment to investigate a previously unknown witness who allegedly knew the source of the check in question? Can a defendant assert that he was denied due process and ineffective assistance of counsel because he could not in good conscience participate in what he considered to be a mock trial for which he was denied an

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opportunity to prepare, and therefore refused even to talk with his counsel after the adjournment was denied? Is the convenience of an out-of-state prosecution witness sufficient to override all the above reasons for a brief adjournment?

* * * *

GROUNDS OF MOTION FOR ADJOURNMENT

The defendant and his counsel presented fourteen reasons to the court for requesting an adjournment, which are outlined below under four basic categories.

I. Basic Unfairness.

At no time during the nine months intervening between the defendant's arrest and his trial, eight months of which he spent in jail, did the defendant request an adjournment of the trial date prior to the motion now in question (12). He had, however, submitted a motion pro se to inspect the grand jury minutes and dismiss the indictment on the ground that the only person who testified as to the authenticity of the check in question was not qualified to do so (the charges had previously been dismissed after a preliminary hearing), and had repeatedly requested a decision on his motion. No action whatsoever

was taken on the defendant's motion until the prosecution's chief witness from Wisconsin (a witness qualified to testify as to the authenticity of the check) was present in Rochester for this and a companion case - five months later - at which time the motion to dismiss was summarily denied and, since trial was now convenient for the prosecution, trial was ordered to commence immediately (5-6, 12, 15). Less than one day's notice of the trial date was given, and no adjournment whatsoever was permitted the defendant (12).

The defendant's motion to dismiss was not a mere formal motion, but was one of substance upon which the defendant reasonably expected affirmative relief, which accounts for his lack of prior consultation with counsel about his defense. It was the trial judge's unreasonable five-month delay in ruling on this motion until the prosecution's out-of-state witness was available and the prosecution was ready for an immediate trial which was one of the main causes of the defendant's unreadiness for trial.

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II. Trial Preparation.

One of the most important reasons for the requested adjournment was the defendant's request that his defense counsel locate and talk with a previously unknown witness who allegedly knew where the check in question came from (15). The defendant said that he wished time to retain private counsel (4-5, 22-23), and that there had been inadequate consultation between him and his assigned counsel, his having seen counsel only twice, both times being in court (5, 22-23) when nothing of substance could be said.

Defense counsel added that the prosecution's motion for an immediate trial was totally unexpected, his having been told by the prosecution the previous Friday, January 10th, to be prepared for the trial of another case, which was called ready on Monday, January 13. The instant defendant's case did not appear on Monday's trial docket, but on Tuesday, defense counsel's other case was deleted from the trial docket and the instant defendant's case was substituted for it without advance warning. Defense counsel complained about the highly irregular calendar

practice, asserted his believe that it was done solely for the convenience of the prosecution, and said that he was not prepared to go to trial immediately because of the necessity of investigating the new witness which the defendant had just been able to tell him about (13-15). The court's only comment was that the defense counsel had been ready for trial for ten months and that the court could not understand why he was no longer ready (17).

III. Trial Tactics.

After the denial of the adjournment, the defendant announced that he refused to participate in the trial in any way (9, 33). Although this refusal might, on the surface, appear to be an arbitrary action by the defendant, he obviously felt that he was being discriminated against and deprived of an opportunity adequately to prepare his case; consequently, he would not lend his tacit approval to the court's action by participating in what he considered, with some justification, to be a mock trial.

The defendant's refusal to participate in

his trial necessitated a drastic change in trial tactics to the defendant's detriment. Defense counsel pointed out to the court that because of the defendant's determination not to participate, the voir dire had to be changed to allude to the defendant's prospective failure to testify and that his opening remarks would have to be re-tailored by attacking the prosecution's evidence without offering any explanation, since the defendant would present no case (33-34). At the conclusion of the trial, the defense counsel again pointed out that because of the judge's refusal to grant an adjournment and the defendant's consequent insistance on nonparticipation in the trial, he would be able to present no witnesses on behalf of the defendant (91-92).

IV. Plea Negotiations.

The defendant also stated that he wanted some time to reflect upon the court's denial of his motion to dismiss to determine how it affected the defense of his case (13, 15), and to have a reasonable time to attempt to negotiate a plea on the two felony counts in the indictment (13). Defense

counsel pointed out that although there had been some conversation with the prosecution about a plea, there was no opportunity to have any negotiations after the motion to dismiss was denied, since the prosecution moved for an immediate trial upon that denial (13).

The trial judge's basic attitude is summed in the following quotation: "I feel that this defendant has had every opportunity, and he is not going to wait until this case is moved for trial and then come in and say, 'I'm not satisfied', or for any reason wants another lawyer." (20) In view of the surprise of the trial date and the judge's own delay in deciding the motion to dismiss until the trial date, it is patently unfair and misleading to say that the defendant waited until his case was moved for trial to say that he needed more time, especially when there was a stated need to locate and investigate a previously unknown, and potentially important, witness.

The trial judge's denial of even a brief adjournment deprived the defendant of an opportunity to consult with his counsel, denied him the opportunity

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to locate and examine an important witness, denied him the opportunity to conduct plea negotiations, and resulted in the defendant's justifiable refusal to participate in such a sham trial, necessitating a complete change in trial tactics and a totally inadequate presentation of the defendant's case. It is asserted that the reason for the denial of an adjournment was solely to prevent the prosecution's out-of-state witness from being detained in Rochester for even one day longer, and that this reason is not sufficient to arbitrarily deny the defendant his right to due process of law in violation of the Fourteenth Amendment and his right to the effective assistance of counsel in violation of the Sixth Amendment.

CONCLUSION

THIS COURT SHOULD GRANT CERTIORARI, AND THE JUDGMENT BELOW SHOULD BE REVERSED.

Respectfully submitted,

LESLIE A. BRADSHAW, ESQ.
Attorney for Petitioner
Assistant Public Defender
Monroe County
Appeals Division
65 Broad Street
Rochester, New York 14614
(716) 454-7200, Ext. 381

APPENDIX A - Opinion of the Appellate Division of the Supreme Court of New York, Fourth Judicial Department.

APPELLATE DIVISION
OF THE
SUPREME COURT
STATE OF NEW YORK
FOURTH JUDICIAL DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

vs.

JIMMY SCOTT,
Appellant (#24138 Attica).

The appellant herein having made application for an order granting leave to prosecute an appeal from a Judgment of Conviction of the Monroe County Court, entered February 13, 1969, as a poor person, and for other relief.

Now, upon reading and filing the affidavit of Jimmy Scott, sworn to the 20th day of March, 1969 with proof of service thereof upon the attorney for the respondent,

It is hereby ORDERED, That said application be, and the same hereby is, granted to the extent that the appeal herein may be prosecuted upon the judgment roll filed pursuant to Code of Criminal Procedure §485, and the copy of the stenographic minutes of the entire proceedings of the trial certified by the stenographer and filed pursuant to Code of Criminal Procedure §456, and sixteen copies of appellant's brief, reproduced in accordance with CPLR 5529; the time for argument of the appeal is hereby enlarged to include the Term of Court commencing on September 8, 1969, and Charles L. Willis, Esq., of 65 Broad Street, Rochester, New York, is hereby assigned as counsel to conduct the appeal, and otherwise the application is hereby denied.

ENTER

LESTER A. FANNING

Entered: April 9, 1969

LESTER A. FANNING, Clerk.

APPENDIX A - Opinion of the Appellate Division of the Supreme Court of New York, Fourth Judicial Department.

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, LESTER A. FANNING, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 9th day of April 1969.

LESTER A. FANNING
Clerk.

APPENDIX B - Amendment to the remittitur of the Appellate Division of the Supreme Court of New York, Fourth Judicial Department.

APPELLATE DIVISION
OF THE
SUPREME COURT
STATE OF NEW YORK
FOURTH JUDICIAL DEPARTMENT

Present: Goldman, P.J., DelVecchio, Witmer, Gabrielli, Bastow, JJ.

PEOPLE OF THE STATE OF NEW YORK,
Respondent,

-vs-

JIMMY SCOTT,
Appellant.

A motion having been made on the part of the appellant for an order amending the remittitur order of this court entered October 23, 1969, affirming the judgment of conviction of the Monroe County Court,

Now, upon reading and filing the affidavit of Leslie A. Bradshaw sworn to the 11th day of March, 1970, the notice of said motion with proof of service thereof, the opposing affidavit of George E. Masters sworn to the 13th day of March, 1970, and due deliberation having been had thereon,

It is hereby ORDERED, That said motion be, and the same hereby is granted, and the order heretofore entered October 23, 1969, is hereby amended by adding the following: Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Whether the rights of the defendant under the Sixth and Fourteenth Amendments to the United States Constitution were denied. The Appellate Division, Fourth Department held that there was no denial of defendant's constitutional rights (33 A D 2d 657).

Enter.

LESTER A. FANNING

Entered: April 2, 1970

LESTER A. FANNING, Clerk.

APPENDIX B - Amendment to the remittitur of the Appellate Division of the Supreme Court of New York, Fourth Judicial Department.

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N. Y.

I, LESTER A. FANNING, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the within is a true copy of the original order, now on file in this office, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this 2nd day of April 1970

LESTER A. FANNING
Clerk.

APPENDIX C - Order denying permission to appeal to the New York Court of Appeals.

STATE OF NEW YORK
COURT OF APPEALS

BEFORE: HON. MATTHEW J. JASEN, Associate Judge.

THE PEOPLE OF THE STATE OF NEW YORK,
against

JIMMY SCOTT.

I, MATTHEW J. JASEN, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above named appellant for a certificate pursuant to §520 of the Code of Criminal Procedure, and upon the record and proceedings herein, there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Buffalo, New York
February 5, 1970.

MATTHEW J. JASEN
Associate Judge

MONROE COUNTY
INDICTMENT NO. 247
filed 5/23/68
AFFIRMED 10/23/69